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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 14

MAE WHEELER, ET AL., APPELLANTS

v.

JOHN MONTGOMERY, DIRECTOR OF THE STATE DEPARTMENT OF SOCIAL WELFARE, AND RONALD BORN, GENERAL MANAGER OF THE SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 62

JACK R. GOLDBERG, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK, ET AL., APPELLANTS

v.

JOHN KELLY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT OF CALIFORNIA AND THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of April 21, 1969, inviting the Solicitor Gen-

oral to express the views of the United States with respect to these cases.

OPINIONS BELOW

The opinion of the three-judge district court in No. 14 (Wheeler App. 62[1]) is reported at 296 F. Supp. 138. The opinion of the three-judge district court in No. 62 (Goldberg App. 365a) is reported at 294 F. Supp. 893.

JURISDICTION

In No. 14, the district court's judgment was entered on April 19, 1968, and the notice of appeal was filed on June 14, 1968. In No. 62, the judgment was entered on December 13, 1968, and the notice of appeal was filed on January 6, 1969. In both cases, this Court noted probable jurisdiction on April 21, 1969 (394 U.S. 970–971). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the Constitution requires the States to afford recipients of welfare assistance a trial-type hearing before suspending, terminating or reducing their benefit payments.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Social Security Act, as amended, 42 U.S.C. 301 *et seq.*, are as follows:

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[1] "Wheeler App." citations are to the appendix in No. 14. "Goldberg App." references are to the appendix in No. 62.

§ 302(a). A State plan for old-age assistance, or for medical assistance for the aged, or for old-age assistance and medical assistance for the aged must—

* * * * *

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for assistance under the plan is denied or is not acted upon with reasonable promptness * * *.

§ 602(a). A State plan for aid and services to needy families with children must * * * (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness * * *.[2]

Pertinent excerpts from Part IV of the Handbook of Public Assistance Administration of the United States Department of Health, Education, and Welfare (hereafter "Handbook") are set out in Appendix II to the Brief for Appellants in No. 14. The relevant provisions of the California Welfare and Institutions Code and of California state regulations are set out in Appendices III and IV to the Brief for Appellants in No. 14. The applicable New York state regulation is set out in Appellant's Brief in No. 62, pp. 2–5.

STATEMENT

Rather than attempt its own description of the facts of the pending cases, the government sets forth below

[2] Parallel provisions apply to the programs of aid to the blind, aid to the permanently and totally disabled, aid to the aged, blind, or disabled, and medical assistance. 42 U.S.C. §§ 1202(a)(4), 1352(a)(4), 1382(a)(4), and 1396a(a)(3) (Supp. IV).

only a brief summary of the proceedings below. Like the brief *amicus curiae* which the government filed in No. 62 below, the Statement is principally devoted to an explanation in outline form, based on information supplied by the Department of Health, Education, and Welfare, of certain Federal policies and procedures applicable to the Federal-State programs involved here.

1. WHEELER V. MONTGOMERY

In No. 14, the appellant, Mae Wheeler, brought an action for individual and class declaratory and injunctive relief from California welfare procedures permitting the termination or suspension of assistance—including assistance from Federal-State programs under the Social Security Act—before the giving of notice and an opportunity to be heard in a trial-type proceeding. The State assistance program specifically involved was Old Age Security assistance, which is eligible for federal funding under Title I of the Social Security Act, 42 U.S.C. 301 *et seq.*, subject, *inter alia,* to a requirement that the participating state agencies provide a "fair hearing,"[3] on request, to any claimant to whom assistance is denied. 42 U.S.C. 302(a)(4). Because the complaint sought to enjoin the operation of California statutes and regulations of general application on grounds of conflict with the Fourteenth Amendment, a three-judge dis-

[3] To avoid any confusion between the statutory requirement of a "fair hearing" and a hearing that is fair in the constitutional sense of meeting the requirements of the Due Process Clause, quotation marks are used where the statutory hearing is referred to.

trict court was convened.[4] 28 U.S.C. 2281; Wheeler App. 29–31.

California then amended its Public Social Services Manual to provide for the termination procedures, now in effect, which were ruled on by the district court. These procedures require that whenever a decision is made to withhold welfare assistance from a present recipient, a notice of the proposed action and the reasons for it must be given to him at least three mail-delivery days before the withheld assistance ordinarily would be received. The recipient is then entitled to an informal conference with his caseworker or another responsible person in the county department, before the withdrawal takes effect, to "learn the nature and extent of the information on which the withholding action is based," to "provide any explanation or information" to the officials concerned, and to "discuss the entire matter informally for the purposes of clarification and, where possible, resolution." Brief for Appellants in No. 14, pp. 19a–20a.

The district court concluded that this pre-termination informal conference procedure, taken together with the trial-type "fair hearing" required by statute and regulations to be held soon after termination, met the demands of due process.

[4] In convening the three-judge court, the ruling district judge noted that the pleadings also raised by inference a further constitutional challenge—that if the California termination procedures were not repugnant to the Social Security Act, that Act was repugnant to the Due Process Clause of the Fifth Amendment. Wheeler App. 30.

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2. GOLDBERG V. KELLY

The action in No. 62 was brought by a number of New York State welfare recipients; some of them were recipients of general assistance under state law and the others were recipients of Aid to Families with Dependent Children ("AFDC"), a federally-funded program under Title IV of the Social Security Act, 42 U.S.C. 601 *et seq.* Like Mrs. Wheeler, they sought individual and class declaratory and injunctive relief from the operation of New York statutes and regulations which permitted the termination or suspension of benefits before the giving of notice and an opportunity to be heard in a trial-type proceeding, on grounds of conflict with the Due Process Clause of the Fourteenth Amendment. A three-judge district court was convened. Goldberg App. 131a–139a.

At the time the suit was brought, State regulations provided for neither notice nor hearing before termination of welfare assistance, but permitted recipients under state as well as Federal-State programs to obtain a trial-type hearing after termination. During the pendency of the action, the state regulations were amended—for both State and Federal-State programs—to require local program administrators to choose one of two new procedures: (1) an informal pre-termination hearing procedure similar to that adopted by California; and (2) a review-on-the-record procedure in which recipients would be permitted to submit written statements showing why their benefits should be continued. Both options require seven days advance written notice of the reasons for a proposed termination, and both continue the provision for a post-termi-

nation "fair hearing." New York City chose to apply the second of these procedures to all its aid programs. Goldberg App. 368a–371a.

The district court concluded that this second procedure violated the Due Process Clause. Goldberg App. 380a–386a. It held that the first procedure—less immediately involved since all the plaintiff-appellants resided in New York City and accordingly would be processed under the second—would be permissible if construed to require both confrontation of persons whose credibility was in question regarding the factual basis for terminating benefits and that the reviewing officer be a superior of the person proposing the adverse action. Goldberg App. 386a–389a. The court noted that nothing in its opinion was "meant to affect the right to a post-termination hearing in accordance with the procedures already in existence," Goldberg App. 391a—*i.e.*, the "fair hearing" procedures required by federal law for programs under the Social Security Act and carried over by State law into State-funded general welfare programs. Thus, as in *Wheeler*, the court appeared to reach its conclusions in the context of an assurance that a full post-termination trial-type hearing would be had.

3. THE FEDERAL REQUIREMENTS APPLICABLE TO TERMINATING OR REDUCING WELFARE PAYMENTS

During the past few years, considerable attention has been focused on the operation of federally funded programs under the Social Security Act. Much of this attention has been directed to the questions of eligibility and level of welfare assistance, and the proce-

dures for determining these issues. As a result, those procedures have been in considerable flux. We set out below, first, the procedures that have been generally required until recent times of States participating in federal programs; and second, the current requirements, the product of changes of which most became effective July 1, 1968.

A. THE REQUIREMENTS PRIOR TO 1968

As originally enacted in 1935, the Social Security Act provided that each State plan for public assistance must provide for granting to any individual, whose claim for aid or assistance is denied, an opportunity for a "fair hearing" before the State agency. Sections 2(a)(4), 402(a)(4) and 1002(a)(4) of the Social Security Act, Public Law No. 271, 49 Stat. 620 *et seq.* The Social Security Act Amendments of 1950, 64 Stat. 477, 549, added the requirement that such hearings be afforded in cases where claims for benefits were not acted upon with reasonable promptness; otherwise, the provisions have continued without substantial change to the present.

On the basis of these "fair hearing" requirements and the Secretary's general authority to require that the States provide for such methods of administration as he finds necessary for proper and efficient operation, 42 U.S.C. 302(a)(5), 602(a)(5), the Secretary (like his predecessors, the Federal Security Administrator and the Social Security Board) has prescribed detailed procedural requirements for "fair hearings." Any claimant who is aggrieved by any agency action affecting his receipt of assistance, including termina-

tion, must be afforded a hearing if he requests one. The claimant must be informed of his right to a hearing, how to obtain it, and that he may be represented by counsel; and any clear expression of a desire to present his case to higher authority must be treated as an effective request. Hearings are to be conducted by impartial officers, in accordance with published procedures, at a time and place convenient to the claimant and after reasonable notice to him. At the hearings, the claimant must have an opportunity to examine all documents and records used at the hearing, refute any testimony or evidence, present his own evidence, witnesses, and testimony, advance all pertinent arguments and secure consideration of any factual or legal issue important to his claim. The decision must be based exclusively on the evidence and other material introduced at the hearing. Handbook §§ 6200, 6300; Brief for Appellants in No. 14, pp. 3a–9a. In short, while "[t]he hearing is conducted in an informal rather than formal court-type procedure in order to serve the best interests of the claimant [, it] * * * is to be subject to the requirements of due process." *Id.* at § 6400(a), p. 10a.

Although these procedures are followed at the "fair hearing," until recently the only requirement for agency procedures prior to termination or reduction of payments to individuals already receiving aid or assistance was that the payments must be continued until there had been a formal agency determination that the individual was no longer eligible or was eligible only for lesser amounts. That is, agencies could not terminate or reduce assistance pending in-

vestigations or the evaluation of information it had received. Handbook, § 2200(b)(4). But they were not required to inform recipients that an investigation or evaluation was under way or to permit them to participate in the process leading to this initial decision. Once the agency decided to terminate or reduce assistance, it could do so without advance notice or any hearing procedures and then notify the individual of his right to a "fair hearing."

The rules governing Federal funding operated in a way which probably encouraged the States to make these determinations promptly, and did not encourage involvement of the recipient at this stage. As a matter of overall policy, there is a strong interest in paying assistance to all individuals who are eligible, and in denying assistance to all individuals who are not eligible. There is also a need, in a Federal-State program, for a fair sharing between the Federal and State governments of the costs of those cases in which, despite the best efforts of the administrators to determine eligibility, payments are made to persons later found to have been ineligible. Accordingly, Federal matching funds are paid in cases where a State follows the correct procedures but erroneously determines that an individual is eligible. To this extent, the Federal government shares in the payment of ineligible cases, in the interests of orderly administration.

As a condition of such payments under the previous regulations, however, the Federal government insisted on speedy action, with respect to both the periodic regular reevaluation of all recipients and the special evaluations which the States are expected to undertake

upon receipt of information suggesting the possible ineligibility of particular recipients. Thus, if redeterminations of eligibility were not made within prescribed time periods and the recipient turned out to have become ineligible, Federal financial participation was not available for payments in periods beyond the deadline for making the redetermination. Handbook § 2200(d); § 5514, item 2a. Similarly, the State must investigate within 30 days any report of possible ineligibility received during the interim between regular reinvestigations. Handbook § 5514, item 2b. The periods allowed did not permit lengthy procedures.

As a result, where assistance was terminated or reduced and a "fair hearing" was then requested, the usual state practice was to leave the termination or reduction in effect pending the hearing. The States could continue the payments if they wished, but Federal financial assistance was not provided, and in practice the States did not ordinarily make such payments without Federal matching. If the hearing decision was in favor of the individual, the States could reinstate the payments prospectively, or they could pay for the back period. If they chose the latter course, they would receive Federal matching funds.

B. THE PRESENT REQUIREMENTS

The recent changes, most of which took effect on July 1, 1968, considerably modified the existing practice by requiring advance notice that adverse action is planned, and an opportunity for an informal conference before that action takes effect, and providing an enlarged scope of federal funding participation

during the process of assistance reduction or termination.

Thus, it is now required for participation in federally funded programs that when a question arises concerning change in a recipient's circumstances, the agency must give—

> advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance. [Handbook § 2300(d)(5).]

This procedure is designed to serve several purposes in the public assistance programs. First, it gives the individual a chance to bring new or additional facts to the agency's attention; thus, he may be able to show, prior to any more formal action, that his situation has not actually changed, or has changed to a lesser degree than the agency believes. If he can thereby avoid termination of assistance, it benefits both the individual, who does not have his usual payments interrupted and need not seek a "fair hearing," and the agency, which will be spared the expense and staff time involved in an unnecessary formal hearing. Moreover, because this advance notice procedure must be followed in all cases, even those recipients who would not contest termination of assistance are given some time to prepare for the effect which it will have on their financial situations, eliminating the element of surprise.

It soon became obvious that states with information of possible ineligibility could not comply with this new requirement within the 30-day period allowed for

making a determination of ineligibility during which Federal matching continued. Accordingly, the States are now permitted an additional 30-day period of federal matching during which to give the advance notice, provide time for the recipient to obtain and appear at a conference, consider any new evidence or other relevant matters he may raise, and determine whether he is still eligible. Handbook § 5514, item 2c. The fact that the new period is this brief, however, shows that the conference is conceived as an informal and expeditious proceeding before local staff, not a trial-type "fair hearing" at the State agency level. It is merely a method of providing notice and screening out those cases which can be resolved by informal procedures.

After the advance notice procedure, the agency makes its determination on the basis of all the information it then has available. Assistance payments must be continued as before to this point. If the agency determines that assistance will be terminated or reduced, it must communicate this decision in writing to the individual and advise him of his right to request a "fair hearing" before the State agency. If a "fair hearing" is not requested, that is the end of the matter. If a hearing is requested, the State must hold it and take final administrative action within 60 days of the request,[5] Handbook § 6200(j), but is not re-

[5] The State is allowed an additional 30 days of federal matching to carry out the mechanics of discontinuing or reducing payments. Handbook, § 5514, item 2d. Thus, a total of three 30-day periods—for investigation of ineligibility, for the advance notice and conference, and for stopping the payment—are allowed for continuation of Federal matching of State payments to ineligible individuals and families.

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quired to continue assistance pending the hearing and decision. If the State does continue assistance, however, Federal matching funds now will be paid, Handbook § 6500(b), whether the hearing decision is in favor of the recipient or the agency. Two or three of the States continue assistance pending hearing. In all of the other States, if the hearing decision is in favor of the recipient, the agency is required to make corrected payments retroactively to the date of the incorrect action terminating or reducing payments, Handbook § 6200(k), and Federal matching funds are paid for these corrected payments, Handbook § 6500(a). (a).

In sum, under the currently applicable HEW requirements, assistance payments under federal programs may not be terminated or reduced until the recipient has been given advance notice and an opportunity for a conference, and the agency has made its determination. If the payments are terminated, the individual may obtain a "fair hearing" which comports with the customary requirements of due process before such termination becomes final. If the hearing decision is in favor of the recipient, corrective payments must be made retroactively. The state at its option may continue payments pending the hearing and, if it does so, there will be federal sharing in the payments regardless of whether the decision is in favor of the recipient or the agency.[8]

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[8] On August 20, 1969, the Secretary postponed from October 1, 1969, to July 1, 1970, the effective date of a new regulation requiring that, in cases involving questions of fact or judgment relating to the particular individual involved (as distinguished from cases involving the application of a gen-

SUMMARY OF ARGUMENT

No question has been raised that the trial-type hearing that is held at the request of the recipient of welfare assistance before the termination or reduction of his benefits becomes final, satisfies both the statutory requirement of "fair hearing" and the constitutional requirement of procedural due process. The issue here is the narrower one of the timing of such hearing: whether it must be held before there is any preliminary termination or reduction of benefits. We submit that the present administrative practice—under which the beneficiary receives advance notice of a proposed termination or reduction of his benefits, has the opportunity for informal conference with the staff of the State welfare agency before such action is taken, and can obtain a "fair hearing" before such termination or reduction becomes final—satisfies the statutory and constitutional requirements of fair hearing.

A. Where questions of administrative procedure are concerned, "the requirements of due process frequently vary with the type of proceeding involved" (*Hannah* v. *Larche*, 363 U.S. 420, 440). In the context of public welfare programs, these requirements also may vary

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eral policy to individual cases, see *infra*, pp. 33–35), assistance be continued until there has been a trial-type hearing. 34 F.R. 13595 (1969). A press release of the Department of Health, Education, and Welfare explained that the States are still putting into effect the federal requirements which became effective July 1, 1968, and are working out attendant problems, and that some States have taken the position that the effect of the new regulation will be to keep recipients on the rolls beyond the point of reasonable question about their eligibility.

with the nature of the programs adopted. We discuss only what procedures are required for the particular program here involved.

The determination of the appropriate procedures here requires a balancing of competing social policy considerations involving, on the one hand, the government's interest in avoiding improper expenditure of welfare funds and unduly burdensome procedures, and on the other hand the interest of the recipients of public assistance in fair treatment and proper receipt of the benefits Congress intended them to have. Since we are interpreting the statutory requirement that there be a "fair hearing," substantial weight should be given to the expert judgment of the Secretary that, on the basis of present experience with the operation of public assistance programs, the procedures he has adopted constitute the most appropriate method for accomplishing the congressional directive. The current procedures became effective only on July 1, 1968, and it is still too soon to make an adequate assessment of their effectiveness. The changes they have made have required substantial modifications by the States of their prior practice, and these modifications have not been completely achieved. If the present procedures should prove inadequate properly to accomplish the Congressional purpose reflected in the federal program here involved, the Secretary can make further changes. It is important, however, that his flexibility to do so should be preserved, and that fixed procedures should not be required.

There is a strong public interest in avoiding continuation of payments to persons who are not entitled

thereto, both to avoid improper disbursement of government funds and to prevent prejudice to the interests of eligible persons who would suffer if substantial sums were paid to ineligible ones. If benefits were required to be continued whenever a trial-type hearing was requested, the inevitable result would be the disbursement of significant amounts to persons ultimately found not entitled thereto.

B. If, contrary to our submission, the Court were to conclude that the present procedures are inadequate, it should not require a preliminary trial-type hearing in every case before payments can be initially terminated or reduced. Such a requirement, which the court below in No. 62 came close to adopting, would cause substantial and unnecessary delay in a large number of cases and would impose needless expense upon the welfare programs. Moreover, the court below in No. 62 apparently would require a trial-type hearing even where the only issue raised by the claimant is the validity of settled principles of general applicability—as, for example, a challenge to the general level of benefits. Requiring a trial-type hearing in every such case before benefits could be initially terminated would mean that persons who had no hope of ultimately prevailing because they are ineligible under the challenged practice nevertheless could continue to receive benefits until the hearing were held. A trial-type hearing ordinarily is not required before a general principle is routinely applied to a particular individual.

ARGUMENT

NEITHER THE DUE PROCESS CLAUSE NOR THE STATUTORY REQUIREMENT OF "FAIR HEARING" REQUIRES A TRIAL-TYPE HEARING BEFORE WELFARE ASSISTANCE PAYMENTS ARE TERMINATED OR REDUCED

No question has been raised in these cases that the trial-type hearing, accorded on request to the recipient of welfare assistance before the termination or reduction of his benefits becomes final, satisfies both the statutory requirement of "fair hearing" and the constitutional standard of procedural due process. The issue, rather, involves the timing of such hearing: whether, as the recipients contend, it must be held before there is any suspension, termination or reduction of benefits, or whether, as the Secretary believes, the constitutional and statutory requirements are satisfied as long as the recipient can obtain such "fair hearing" before there is a final determination as to whether his benefits are to be ended or reduced.

To state the issue another way, in the context of public assistance programs involving millions of recipients and thousands of possible hearings every year, do the essential elements of fair procedure require anything more than the present practice? Under that practice, (1) the beneficiary receives advance notice that his payments are to be terminated or reduced; (2) he has the opportunity for a conference with the staff of the welfare agency before such termination or reduction, at which the reasons for the action will be explained to him and he can present any facts or explanations showing why his assistance should be continued at its existing level; (3) if the state then termi-

nates or reduces assistance, he can obtain a "fair hearing" before the state action becomes final; and (4) if he prevails at such hearing, he receives back payments for the interim period during which his benefits were terminated or reduced.

Our submission is that the present procedures satisfy both the statutory and constitutional requirements of fair hearing, and that a trial-type hearing is not required before public assistance is suspended, terminated or reduced. It also follows, we believe, that welfare recipients are not entitled to a continuation of their previous benefits during the period between preliminary termination or reduction and the final decision of the state agency that is rendered after a "fair hearing" in those relatively few cases where such more formal proceeding is requested.

A. THE SECRETARY'S PRESENT PRACTICE—UNDER WHICH THE RECIPIENT OF PUBLIC ASSISTANCE IS GIVEN NOTICE AND OPPORTUNITY FOR A CONFERENCE PRIOR TO TERMINATION OR REDUCTION OF ASSISTANCE AND CAN OBTAIN A TRIAL-TYPE HEARING BEFORE SUCH TERMINATION OR REDUCTION BECOMES FINAL—SATISFIES THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS OF A FAIR HEARING

1. Neither any of the parties nor the United States disputes that the Due Process Clause of the Fourteenth Amendment and, for the District of Columbia, the Fifth Amendment to the Constitution, are applicable to public welfare programs. Although there is no constitutional requirement that such programs exist—so that access to benefit payments could be described for some purposes as a "privilege" rather than a "right"—the fact of their existence carries with it the guarantees against governmental capriciousness

and arbitrariness embodied in those clauses. *E.g.*, *Sherbert* v. *Verner*, 374 U.S. 398; *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6. This observation, however, serves only to frame the question of what procedures are to be followed in benefit termination cases, not to answer it. For where questions of administrative procedure are concerned, as distinct from the issues of capriciousness and arbitrariness involved in the cited cases, "the requirements of due process frequently vary with the type of proceeding involved." *Hannah* v. *Larche*, 363 U.S. 420, 440. As the Court explained in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. * * *

There would be significant differences, for example, in the procedures necessary in a zoning case, a prosecution for a capital crime, a garnishment, a suspension of a government employee, or the termination or reduction of public assistance.

2. In the context of public welfare programs, we believe those requirements might also vary with the nature and aims of the programs adopted. If a State wished to—and assuming it constitutionally could—revert to programs for dispensing charity to the "worthy poor," it might be permitted far different procedures than would have to attend programs whose purposes include promotion of equity among all recipients and their freedom from the private charity

giver's traditional control. In view of these possible variations, we address ourselves only to the question what due process requires for the federally funded programs here at issue. For their purpose is clear.

> When the Social Security Act was passed its public assistance titles were designed to bring about, for the population groups to which they applied, important changes in the manner of dispensing aid to the needy. The public almoner had been prone to assume the prerogatives of the giver of private charity, to grant or withhold according to his judgment of the deserts of the applicant, and often to assume a paternalistic control over the lives of those he aided. The Social Security Act sought to introduce into this field a government of laws, and to that end, among others, attached a series of conditions to its proffer of federal grants-in-aid to the states. One of the conditions requires that the state grant a fair hearing to any applicant who is denied assistance; others look to uniform application of the plan throughout the state, to equitable treatment of persons in differing economic situations, and to the safeguarding of information about applicants and recipients; while the definition of assistance as "money payments" calls for the giving of cash with no strings attached. [Willcox, *The Lawyer in the Administration of Nonregulatory Programs,* Public Administration Review, Vol. XIII, No. 1, Winter 1953, 12, 15–16.]

In thus legislating to provide for the general welfare, the Congress authorized the use of Federal funds to furnish part of the cost of payments made under State public assistance plans. However one may charac-

terize the interest of the beneficiaries of such programs, it certainly is less tangible than that of the beneficiaries of the federal old-age, survivors' and disability insurance program. For under the latter program the potential beneficiaries pay taxes therefor that are placed in a trust fund so that, unlike the public assistance benefits here involved, payments are not dependent upon yearly Congressional appropriations. Yet even under that program the "right" to benefits is not protected under the Fifth Amendment in the manner of personal property (*Flemming* v. *Nestor,* 363 U.S. 603), and benefits are terminated, reduced or suspended without a prior trial-type hearing.[7]

The statutory mandate that there be a "fair hearing" before public assistance payments are denied helps to define the kind of protection that Congress intended to give the beneficiaries of such payments. The statute does not distinguish between the initial denial of applications for benefits and their subsequent denial by termination. When a State agency decides initially that a new applicant for benefits is not entitled thereto, it does so without first holding a trial-type hearing; such a hearing is held only if the applicant requests it; and when such a hearing is sought,

[7] While there are differences between the public assistance and the old age survivors' and disability insurance (OASDI) programs, a requirement that the States must continue public assistance payments pending the "fair hearing" would be inconsistent with the practice authorized under the Social Security Act for the OASDI program, which is directly administered by the Federal government and involves insurance benefits to which individuals have a statutory "right." N. 11, *infra.*

benefits are not paid in the interim.[8] It has never been suggested that this procedure denies the applicant a "fair hearing."

As we develop below, cogent policy considerations support the Secretary's judgment that the same practice should be followed where, following the informal conference procedure, the State initially decides to terminate or reduce benefits. This practice not only accords with the statutory requirement that there be such a hearing before a claim for assistance is "denied," but is further supported by the statutory provisions authorizing the Secretary to adopt such methods of administration as he finds to be necessary for the proper and efficient operation of public assistance plans. 42 U.S.C. 302(a)(5), 602(a)(5).

3. The determination of what procedures and timing are appropriate in an administrative proceeding of this type requires a balancing of competing social policy considerations. On the one hand, there is the interest of the government in insuring that the procedures do not become either so unnecessarily expensive or so time-consuming and cumbersome that their ultimate effect is to hinder rather than aid in the effectuation of the public policies the program reflects. On the other hand, there is the interest of the persons affected—here the recipients of public assistance—in being fairly treated and in properly receiving the benefits they rightfully can expect the program to

[8] If the applicant prevails at such hearing, benefits are paid retroactively to the date of the initial (but erroneous) denial.

accomplish. These two interests are complementary rather than antithetical. For welfare recipients would suffer in the long run if the government were required to follow inefficient and unnecessarily burdensome requirements, while the public interest would suffer if the recipients were not treated fairly.

Moreover, since we are dealing with the interpretation of the statutory command that there be a "fair hearing," it is appropriate to give considerable weight to the expert judgment of the Secretary that, on the basis of our present experience with the operation of public assistance programs, the procedures he has adopted constitute the most appropriate method for accomplishing the congressional directive.

The current procedures have been in effect only since July 1, 1968, and it is still too soon to make an adequate assessment of their effectiveness in properly accommodating the competing policy considerations. The introduction of the new informal conference procedure and the establishment of the 60-day period for completing trial-type hearings when requested came at a time when an increasing number of public assistance recipients were challenging agency decisions, were represented by counsel and were requesting "fair hearings." In order to handle this increased workload, the States had to hire and train more hearing examiners and to appropriate funds for their employment. Although the States have made substantial progress in solving these problems, they have not been fully surmounted. Moreover, in some States a large number of public assistance recipients have requested "fair hearings" to challenge basic aspects of the particular wel-

fare program involved—contending, for example, that the level of benefits is inadequate.[9] Challenges of this type inevitably lead to extensive delay in the hearing and decision of all pending cases.

The nature of public assistance programs inevitably requires considerable room for experiment and change in determining, through trial and error, what are the most effective methods for carrying out the programs. It is therefore important that flexibility in adjusting the procedures to changing circumstances remain available to the Secretary. Significant changes recently have been made in the procedures, and if they should prove inappropriate in the light of experience in working with them, the way always is open for the Secretary to modify them still further. At this stage of their development, however, the procedures should

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[9] For example, during the week of January 29, 1969, there were approximately 500 requests for hearings in the Miami, Florida, area challenging the amount of assistance and the method of its computation. In seven counties in Kentucky in July 1969 there were 417 requests for hearings challenging determinations of ineligibility that had resulted from a change made by the State of Kentucky in its definition of unemployment. In December 1968 and January 1969 in Los Angeles County, California, there were 222 requests for hearings on the contention that the amount of benefits was inadequate; in Hinds County, Mississippi, in July 1967 there were 184 requests for hearings on the same question. In October 1968 in Philadelphia, Pennsylvania, there were 275 requests for hearings on a claim that each child should receive $50.00 to have an American Christmas.

In addition, there have recently been several instances in which a large number of requests have been made for a hearing on a single issue. For instance, in New York City in November 1968 there were approximately 3,000 requests for hearings on whether the recipient needed a telephone.

not be frozen into the fixed molds into which the public assistance recipients would push them.

4. Tested by these standards, we submit that the Secretary's present procedures for terminating welfare payments meet the statutory and constitutional requirements of a fair hearing.

In view of Congress' choice to require a "fair hearing" for aggrieved claimants of benefits under the Social Security Act and the implications of that choice for the nature of the benefit program, *supra*, p. 22, we do not argue that it is "possible to characterize [the receipt of benefits under the Act] as a mere privilege subject to the Executive's plenary power," so that "notice and hearing are not constitutionally required." *Cafeteria Workers, supra,* 367 U.S. at 895. Nonetheless, the privilege aspect of receipt of benefits colors both the government function and the private interest involved in a way which bears directly on the *prior* hearing question.

As a matter of government function, it is reflected in the right of the federal and state governments to place budgetary limitations on the total expenditures they will undertake for these programs. More dramatically than a simple desire for efficiency or low cost, such limitations make an accurate allocation of funds to eligible persons imperative; if large numbers of ineligible persons are able to enforce a right to receive benefits for substantial periods of time, the effect will be to reduce the amounts available for sharing by eligible recipients. It seems predictable that if payments are continued pending "fair hearing" there will be more requests for such hearings,

and more payments will be made to ineligible individuals.

The full effect of continuation of payments pending hearing would be experienced only over a period of years. At present, information is scanty. Mississippi, however, in August 1968 put into effect a policy of continuing assistance pending "fair hearing" in cases of termination of assistance. For the year ended June 30, 1969, the increase over the previous year in the number of hearings requested was substantially greater in cases involving termination of benefits than for all welfare cases; the latter increased roughly 40 percent, from 772 to 1059, while the former increased approximately 200 percent, from 97 to 288. Of the 288 requests for hearings in 1968–1969 involving termination of benefits, 46 were withdrawn prior to hearing, one claimant died before hearing, 26 cases were pending on July 1, 1969, and 215 decisions were rendered. 50 decisions were in favor of the claimant, and 165 decisions upheld the agency's determination. Thus, on the basis of the "fair hearing" decisions, the claimant was ineligible in 77 percent of the cases where assistance was continued. In the prior year, when benefits were not continued pending hearing, 57 hearings were held in termination cases; the claimant prevailed in seven, and the State agency in 50.

Moreover, the cognizable private interest in continued receipt of welfare benefits pending hearing is more tentative than a direct interest in property as such. The issue is not whether a present asset is to be taken away from its owner, but whether the recipient shall continue to share in a limited resource although (un-

like others) his eligibility is in serious doubt. There could be no legitimate interest in a prior hearing simply as a means by which ineligible persons could prolong the time during which they continue to receive benefits at the expense of the general public and, possibly, of eligible recipients. The interest arises because some individuals in fact are, or have a sound claim that they are, eligible despite a preliminary determination to the contrary, and therefore, should not be made to suffer such hardships as are set out in the complaints. Thus, as would not be true of property determinations, assessment of the individual's stake in a prior hearing depends on how often the individuals requesting such hearings prevail.

The present case is therefore unlike *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, where the Court invalidated, under the Due Process Clause of the Fourteenth Amendment, a State procedure by which wages could be garnished without prior notice to or opportunity for hearing for the wage earner. The key to that decision was that "[w]e deal here with wages—a specialized type of property presenting distinct problems in our economic system" (p. 340). Both the majority opinion and the concurring opinion of Mr. Justice Harlan made plain that the State procedure was invalid because garnishment involves the immediate taking of a wage earner's "property"; and the Court stated (p. 339) that although "[s]uch summary procedure may well meet the requirements of

due process in extraordinary situations,"[10] garnishment by a wage earner's creditor was not such a situation. In the present case, however—as in cases involving government employment, licenses, and other benefits commonly dealt with through the administrative process—the recipients have no property (in the classic sense) of which the government is seeking to deprive them. In cases involving the question what procedural due process required in this "property"-less context, this Court has several times indicated that the answer permissibly varies with the proceeding and private interests concerned.[11] *E.g., Hannah* v.

[10] The class of "extraordinary situations" is large enough to include summary actions to protect government revenues. *Phillips* v. *Commissioner*, 283 U.S. 589, 595–597. Thus, even should this Court conclude that this case does fall within the teaching of *Sniadach*, it does not follow that hearings *prior* to termination or reduction are constitutionally required. It would be necessary to assess whether in the welfare context any threat to government revenues posed by a requirement of prior hearing is so great as to justify summary procedure.

[11] Statutory solutions to the problem have not been uniform. A license to use part of the limited broadcast spectrum may not usually be suspended before notice and hearing, 47 U.S.C. 312 (c); and see 5 U.S.C. (Supp. IV) 558(c); but there is explicit statutory authority to suspend benefits under the Federal Old Age, Survivors, and Disability Insurance Benefits Program before hearing, 42 U.S.C. 403(h)(3), if it appears that there is a danger of overpayments being made, and federal employees are regularly suspended from their employment in advance of the hearings to which they are entitled under the Civil Service Act. As in *Phillips*, *supra*, n. 10, the direct involvement of government revenues in the latter cases may justify a procedure more summary than would be appropriate where a benefit without cost to the government, such as a broadcast license, is concerned. Similarly, in case of "jeopardy," federal taxes may be assessed and collected without any opportunity for prior hearing. Internal Revenue Code, 26 U.S.C. 6861–6864.

Larche, 363 U.S. 420, 440; *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 894–895.

The present statistics show that substantially more ineligible than eligible individuals request "fair hearings".[12] Moreover, if plaintiffs prevail, both the number and proportion of ineligible individuals requesting fair hearings might increase. Such a change might reflect either a substantial degree of use of "fair hearing" requests as a means of prolonging benefit payments for individuals who clearly are no longer eligible, or, as the appellant in No. 62 suggests in his brief, pp. 13–17, the efficient functioning of the relatively new pre-hearing notice-and-conference techniques. In either case, the argument for "fair hearing" prior to termination or reduction of benefits would be even less strong than it is now.

[12] While a substantial proportion of "fair hearings" have in the past led to reversal or modification of adverse agency determinations, only a small proportion of terminations result in requests for such hearings. Thus, forms submitted by California to the National Center for Social Statistics of the Department of Health, Education and Welfare show that in the period July 1, 1968, to March 30, 1969—during which the Brief for Appellants in No. 14 states there were 20 "fair hearings" concerning termination of assistance, p. 13, n. 12—there were a total of 163,635 terminations of assistance under Social Security Act programs. Of these, 98,982 represented termination of assistance under the Aid for Families with Dependent Children program, and the remainder, the various adult programs.

Statistics collected in the annual reports of the Department's Nationwide Quality Control System on Public Assistance Case Actions for the year April 1, 1967, to March 31, 1968, show that local agencies in the nation as a whole incorrectly withheld or terminated benefits in 5.6 percent of AFDC and 4.0 percent of adult program cases, and underpaid benefits in 11 percent of AFDC and 9 percent of adult program cases. On the other hand, 1.6 percent of AFDC cases and 1.7 percent of adult pro-

The currently applicable Federal requirements strike the balance fairly in the light of what is presently known. The individual has advance notice of termination or reduction of assistance and opportunity for conference. Such conference provides an informal, expeditious procedure available to all recipients with respect to whom the agency is contemplating termination or reduction of payments. Everyone is thus informed of the proposed agency action in advance and can get an explanation; if he can show that the contemplated action is incorrect, it can be averted. The emphasis is on notice, communication, and screening out those cases where the agency can readily be shown it is making a mistake, or the recipient can be given information so that he understands why he is ineligible. The risk of incorrect State actions is thereby reduced. If the State agency then determines that the termination or reduction is justified, the claimant is afforded opportunity for a trial-type hearing, which is to be conducted expeditiously. In the minority of cases where the agency action turns out to be incorrect, corrective payments are made.

The procedure thus provides an expeditious method for handling a large volume of cases in a way that gives all welfare recipients the opportunity to explain

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gram cases involved incorrect determinations that recipients were eligible, and 10.4 percent of AFDC and 10.1 percent of adult program recipients were being overpaid during this time. These figures are compiled by State quality control units on the basis of a controlled sampling of local agency case files and are entirely independent of "fair hearing" procedures. These latter figures, however, cover total terminations, and we do not know in how many instances hearings were requested.

to the State agency in advance why their payments should not be terminated or curtailed, with the assurance of a trial-type hearing before such State action becomes final. It satisfies both the statutory and constitutional command of fair hearing.

B. IF THE COURT WERE TO CONCLUDE THAT THE PRESENT PRACTICE IS INADEQUATE, IT SHOULD NOT REQUIRE A PRELIMINARY TRIAL-TYPE HEARING IN EVERY CASE BEFORE PAYMENTS CAN BE INITIALLY TERMINATED OR REDUCED

A principal interest of the United States in this case is to avoid a proliferation of hearings and procedures which would substantially burden the administration of the Social Security Act without conferring material benefit on eligible recipients. The district court in No. 62, however, failed to adopt this perspective. Upon concluding that due process requires more substantial proceedings prior to termination, the court's solution was to enlarge and expand the advance notice and informal conference procedure which is required before the agency redetermines eligibility. By adding the various procedural elements which it concluded are required by due process at that early stage, the court made two significant changes in the overall procedure.

First, the conference is no longer a conference; it is something close to a full-dress hearing at which witnesses must appear, and the recipient has the right to question them, etc. Indeed, the court stated: "We realize that these requirements will duplicate the 'fair hearing' post-termination procedure to some extent." Goldberg App. 385a. Thus, there may be two hearings in each case, the pre-termination and the post-termi-

nation hearing. This seems unnecessary and potentially expensive. Most likely, the 30-day time period now provided for the advance notice and conference procedure will be inadequate in many cases, so that additional time will be needed before the agency can determine whether the recipient has become ineligible. Moreover, the procedure may often prove inadequate to handle cases involving complex factual situations. Finally, it might so burden the agency staff as to add further delays before these matters can be finally resolved—a result as detrimental to welfare recipients as to the agency. Such a procedure does not appear to be conducive to the proper and efficient operation of the welfare program.

The second, and closely related, difficulty arises from the requirement that assistance be continued in all cases until the agency's initial determination, which is made after the first conference-hearing and which, because of the new procedure required for all cases, necessarily will further delay the administrative process at a point where it is already overburdened and dilatory. The added expense to the federal and State agencies could be considerable.

The seriously adverse effect of the decision below in No. 62 is compounded by its application even to cases where the claimant challenges only the provisions of law or settled agency policy. At least one of the appellees in that case, Mrs. Altagracia Guzman, appears to present only such an issue in her complaint. Mrs. Guzman's AFDC payments are alleged to be in imminent danger of termination because she refuses to assign to New York welfare authorities her right of action

against her husband for non-support and, in accordance with an established policy, they therefore threaten to terminate her benefits. She denies neither the facts nor the policy's applicability to her, but simply asserts that the policy "has no support at law and indeed is contrary to the statutes of New York State." Goldberg App. 25a. The court below did not exclude her from the relief granted.[13]

If every individual subjected as a matter of course to the adverse impact of a general administrative policy could require that his benefits be continued pending a trial-type hearing on the lawfulness of that policy, this could almost paralyze the administration of the Act and would add immeasurably to its costs. The effect of requiring trial-type hearings in all such cases would be that persons who could hope to obtain no vindication from the procedures thus invoked[14]

[13] Its failure to do so may have been inadvertent. At one point in its opinion the court noted that "We do not deal here with the issue whether procedural due process requires the right to oral argument on a matter of law. See FCC v. WJR, 337 U.S. 265, 276 * * *. It is true that [*Morgan* v. *United States*, 298 U.S. 468, 481] contained the dictum that '[a]rgument may be oral or written,' * * * but we do not take that to mean that in this case there is no constitutional right to present evidence, as opposed to argument, in person." Goldberg App. 381a. The fact that one of the plaintiffs in fact did wish only to produce arguments, not evidence, appears not to have been adverted to in the proceedings below.

[14] Under the existing HEW regulations, any claimant or recipient of assistance can obtain a "fair hearing" if he is "aggrieved by * * * agency action affecting his receipt or termination of assistance, or by agency policy as it affects his situation." Handbook, § 6200(b). We are informed that the practice under this regulation is to provide "fair hearings" on complaints which, like Mrs. Guzman's, raise only issues of general policy.

because they are ineligible under the policy challenged could continue to receive benefits until the hearing was held. The cost of this delay would have to be borne by the community as a whole and, if total funds available for benefit purposes were limited, by other recipients under the program in the form of reduced benefit levels. Indeed, if prior "fair hearings" were required for each individual adversely affected by a general policy change, they would be required where insufficiency of funds required across-the-board reductions in benefit levels.

A trial-type hearing is not required before such a general rule is applied to a particular individual, unless there are demonstrable special reasons for different action in the individual case. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco*, 377 U.S. 33; *Conley Electronics Corp.* v. *Federal Communications Commission*, 394 F. 2d 620, 626 (C.A. 10). "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. * * * There must be a limit to individual argument in such matters if government is to go on," *Bi-Metallic Investment Co.* v. *State Board of Equalization of Colorado*, 239 U.S. 441, 445. Mrs. Guzman does not allege any special circumstances in her case; she challenges only the general rule.

CONCLUSION

The judgment of the district court in No. 14 should be affirmed. The judgment of the district court in No. 62 should be modified to eliminate the conditions imposed by the court as to the first procedure permitted by the New York statute and, as thus modified, should be affirmed.

Respectfully submitted.

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